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DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

URSULA RUTH EDITH SCHNEIDER, as Personal Representative for the Estate of HEINZ GERHARD SCHNEIDER, deceased,

Appellant,

v.

BARTELLS ASBESTOS SETTLEMENT TRUST, et al.,

Respondents.

Appeal from Clark County Superior Court,
Case No. 13-2-02291-9 (Judge John F. Nichols)

REPLY BRIEF OF APPELLANT

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I.
INTRODUCTION

In our opening brief we demonstrated how the defendants' ill conceived arguments led the trial court to issue a ruling which produced a result which is both illogical and unjust. The defendants' response brief has done nothing to demonstrate anything different.

The opening brief showed that the wrongful death statute[1] requires a death in order to create a cause of action for wrongful death. All parties agree that the statute of limitations for bringing a wrongful death action is three years. Because the action here was brought well within three years of the death of Mr. Schneider, it was error for the court to grant summary judgment on the grounds that the action was barred by the statute of limitations.

In their response, defendants state nothing new. The opening brief demonstrated that the cases they had relied upon in the trial court, and rely upon again here, does not mandate the ruling they claim. Nothing in the response brief changes what they argued below. Their only new answer to support the court's decision below is a somewhat confusing argument about actions the spouse and

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[1]R.C.W. 4.20.010

children should have filed for loss of consortium. We demonstrate below the bankrupt nature of that argument as well as presenting further case law evidence that the ruling is contrary to law and should be reversed.

II.
ARGUMENT

A. The Discovery Rule Is Not an Issue Here

As discussed in the opening brief, the trial court considered the case of *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687, (1985). In that case, the court applied the discovery rule to wrongful death actions and held that the three year statute of limitations did not begin to run until the claimant discovered, or reasonably should have discovered the cause of the death. Plaintiff made clear in the trial court that in this case there is no discovery rule issue. The claimant knew of the decedent's injury, and, when that injury caused his death, she brought the action within three years. No discovery rule was necessary to extend the statute of limitations because the action was filed well within the limits of the statute.

Yet, in their statement of facts, defendants make the following claim:

> 5. Appellant Has Conceded That The Discovery Rule Applies And Has Been Satisfied.
>
> Plaintiff/Appellant has also conceded that has conceded that [*sic*] Appellants had discovered the condition or disease (which later produces death) [*sic*] by 2003.

(Brief of Respondents (RB) at 5)

Aside from the uncertainty of what is meant by the rule being "satisfied," Plaintiff assert, again, vehemently, that this is not a "discovery rule" case. The discovery rule "extends" the time at which the statute of limitations begins to run until the claimant "discovers" the elements of her claim. Here, there was no extension of the statute needed or invoked. The action was brought within the three years from the date of death provided by the statute of limitations. Plaintiff never claimed otherwise, nor do they now.

B. The *Calhoun* Case Does Not Lend the Defendants the Support They Claim

In their motion in the court below, and again in their response brief, the defendants rely extensively on the case of *Calhoun v*

Washington Veneer Co., 170 Wash. 152, 15 P.2d 943 (1932). In that case the court stated that the wrongful death case of the spouse was barred by the running of the statute of limitations on the decedent's cause of action. We have previously distinguished *Calhoun* by its context as an employment case and the fact that the statute under which it was decided is now revoked.[2] The court's decision in *Calhoun* is further undermined by the later case of *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219 (1975).

Gazija was an insurance coverage case in which the insured, a fisherman, sought to recover from the insurer the value of his fishing gear and nets lost when his boat sank. When he discovered the policy had been canceled, allegedly without his knowledge, he sued the insurer. The defendant argued that the action was barred by the statute of limitations because it had accrued at the time the policy was canceled, not at the time of the loss. The fisherman claimed his action was based in tort, not contract, and thus his statute did not begin to run until he discovered the harm.

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[2]"Both *Calhoun* and *Grant* were decided in the context of now-repealed employment laws such as the "Factory Act"[.]" *Barabin v. AstenJohnson, Inc.*, 2014 U.S. Dist. LEXIS 89035 (W.D. Wash. 2014).

The Washington Supreme Court looked back at early cases which had addressed similar issues. Among those was *Shaw v. Rogers & Rogers,* 117 Wash. 161, 200 P. 1090 (1921), in which the insurance agent failed to write the policy with a solvent company and the insured found himself "uninsured" at the time a fire destroyed his building.

> The [*Shaw*] court held the cause of action arose immediately upon failure of the defendant to write insurance with a solvent company. It concluded the action was barred by the 3-year statute of limitations and refused to hold the cause of action accrued when damages arose from the fire that destroyed the building.

Gazija, supra, 86 Wn 2d at 218.

The apparent unfairness of that result caused the *Shaw* court to observe:

> that the amount of damages which could have been recovered had the action been brought immediately upon the breach of the duty, and the amount which was susceptible of the recovery after the fire were different, but it is not material that all the damages resulting from the act should not have been sustained at the time the breach of duty occurred, and the running of the statute is not postponed by the fact that actual or substantial damages do not occur until a later date.

Shaw v. Rogers & Rogers, supra at 163.

Looking back at other cases applying the statute of limitations

in similar circumstance, and the evolving state of that law, the Supreme Court in *Gazija* stated:

> Subsequent cases are not helpful in determining whether Shaw is to be considered as a tort or contract case. *Robinson v. Davis*, 158 Wash. 556, 560, 291 P. 711 (1930); *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 160, 15 P.2d 943 (1932); *Peeples v. Hayes*, 4 Wn.2d 253, 255, 104 P.2d 305 (1940). **To the extent the result in *Shaw* can be ascribed to a characterization of the cause of action as one sounding in tort, we believe the result reached there is incorrect.** (emphasis added)

Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219 (1975)

The significance of this holding is that *Shaw* is one of the cases relied upon by the Supreme Court when it decided *Calhoun.* Looking for support for the proposition that the spouse's statute had run when the decedent's statute ran, the court held:

> As we have heretofore determined, the cause of action accruing to Claude Calhoun under the factory act necessarily accrued about the middle of May, 1928. Appellant did not have a cause of action against respondent because of the death of her husband, but because of the negligence of respondent. The negligence was the cause; the death was the result. Under the statute, the claim for damages accrued, if at all, at the time of the injury to Claude Calhoun. *Horner v. Pierce County,* 111 Wash. 386, 191 P. 396, 14 A.L.R. 707. See, also, 17 R.C.L. 764 and 765; *Shaw v. Rogers & Rogers,* 117 Wash. 161, 200 P. 1090; *Flynn v. New York, New Haven & Hartford R. Co.*, 283 U.S. 53, 72 A.L.R. 1311, 75 L. Ed. 837, 51 S. Ct. 357. From these considerations, we are compelled to

> conclude that both causes of action set up in the amended complaint were barred by the provisions of § 159, supra.

Calhoun v. Wash. Veneer Co., 170 Wash. 152, 160 (Wash. 1932)

The importance of *Gazija* is clear. The court's holding there, that to the extent *Shaw* was a tort action it was incorrectly decided, is applicable here. This is solely a tort cause of action. There is no element of contract in the facts or in the claims of the Plaintiff. That means that *Shaw*, and *Calhoun*, to the extent it relies on *Shaw*, are inapplicable here. Their holdings, that the tolling of the statute at the time of the incident affects the subsequent action, are no longer good law in Washington.

C. The Washington Appellate Courts Have Refuted Defendants' Arguments in the *White* and *Wilson* Cases

The defendants claim that Plaintiff are somehow trying to avoid the rules of *stare decisis* and to have this court create a new rule of law in the face of longstanding Washington law to the contrary.

> Appellant apparently ignores the doctrine of stare decisis and binding Washington Supreme Court precedent that the right to a wrongful death action is "dependent upon the right the deceased would have to recover for such injuries up to the instant of his death." *Johnson*, 45Wn.2d at 421. Rather, Appellant

> essentially asks this Court to overrule the Supreme Court decisions in *Calhoun*, *Johnson*, and *Grant*, and create a new rule of law that a wrongful death plaintiff may bring a claim against a defendant even if the decedent's right to recover for his or her injuries against that defendant expired well before his or her death.

(RB at 10)

As dramatic and convincing as this argument might seem to the defendants, it overstates their case and ignores significant decisions in Washington's jurisprudence. First, it ignores the very clear statement of the Court in *Wills v Kirkpatrick*, 56 Wn. App. 757 (1990). In that case plaintiff, the personal representative of his deceased mother, brought a wrongful death action after the death of his mother, allegedly as the result of medical malpractice. The defendants argued that the medical malpractice act applied and that the statute of limitations under that act began to run at the date of the malpractice and the action was thus time barred. In holding that the wrongful death statute of limitations applied, the Court stated:

> If indeed the medical malpractice statute of limitations applied to wrongful death claims, we would have the situation where such a claim could be barred even before death triggers accrual of the right to bring the action. Such a result seems to us illogical and unjust.

Wills v. Kirkpatrick, 56 Wn. App. 757, 762 (Wash. Ct. App. 1990).

If such a result is "illogical and unjust" in the context of a medical malpractice claim, it is equally "illogical and unjust" here.

Moreover, the defendants' argument, that Washington law is "well settled," and has been for nearly a century (RB at 8), is put in serious dispute by the Supreme Court's decision in *White v. Johns-Manville Corp*:

> Preliminarily, we note we are not faced with, nor do we decide, a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death. In that case there is a question as to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, when the decedent first discovered or should have discovered the injury, or when the claimant first discovered or should have discovered the cause of death. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); *Fisk v. United States*, 657 F.2d 167, 170-72 (7th Cir. 1981); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 n.6 (N.D. Ill. 1981).

White v. Johns-Manville Corp., 103 Wn.2d 344, 347, 693 P.2d 687, (1985).

If the Washington law is "well settled" since the 1930's, as defendants allege, why did the Supreme Court not say so in this 1985 case? The Supreme Court surely had access to and knowledge of *Calhoun, Grant,* and *Johnson.* If, as defendants contend, those cases answered the question years ago, why didn't the court say so? Why

didn't the court say "If the decedent knew the cause of the disease which caused his death, the wrongful death action accrued at that time." That's what defendants claim the law provides. Then why does the Court say there is "a question" as to when the cause of action accrued, cite federal cases for the conflicting potential results of such a claim, and render no opinion on the result? Obviously, the answer to the Supreme Court's question is not at all the pre-determined result defendants would have us believe.

D. Defendants' Loss of Consortium Argument Fails Under Its Own Weight

Defendants present a new argument, not previously raised in the lower court, alleging that the claims here by the spouse and surviving children are barred because they could have, and should have been joined with the claims of the decedent in his prior personal injury action. (RB at 34-35) In addition to raising a new argument not previously considered below, the argument is based on a false premise which is factual, not legal in nature and would thus require the court to overturn the grant of summary judgment.

Defendants claim that the heirs could have joined the decedent's prior personal injury claim by making loss of consortium claims of their own. But there is no evidence anywhere in the record

that the facts in existence at the time would have supported a loss of consortium claim. The elements of such a claim in this case would require more than an injury to the husband. The loss of consortium claim would require a showing of specific injury to the spouse:

> Loss of consortium involves the "loss of love, affection, care, services, companionship, society and consortium . . ." suffered by the "deprived" spouse as a result of a tort committed against the "impaired" spouse. *Lund v. Caple*, 100 Wn.2d 739, 744, 675 P.2d 226 (1984) (quoting *Lundgren v. Whitney's Inc.*, 94 Wn.2d 91, 94, 614 P.2d 1272 (1980)).

Conradt v. Four Star Promotions, 45 Wn. App. 847, 852-853 (Wash. Ct. App. 1986).

The existence of an injury to the husband is not enough. There must be sufficient effect that the spouse suffers:

> [her] own physical, psychological and emotional pain and anguish which results when her husband is negligently injured *to the extent that he is no longer capable of providing the love, affection, companionship, comfort or sexual relations concomitant with a normal married life.* (emphasis added)

Christie v. Maxwell, 40 Wn. App. 40, 47 (Wash. Ct. App. 1985) (citing with approval: *Lantis v. Condon*, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1979).

Similarly, the children's claims for loss of consortium depend

not on the mere fact of injury to the parent, but on the effect of that injury on the child.

> [A] child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party.

Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 140, 691 P.2d 190 (1984). Nothing anywhere in the record shows that at the time Mr. Schneider filed his personal injury claim his heirs suffered any loss of the love, care, companionship and guidance they received from their father. The defendants' proposition that they, with no evidence, can now state that such a claim should have been made years ago, is plainly in error.

E. The Policy Behind Statutes of Limitations Is Meant to Produce Fairness

Defendants here return to their argument that the rule they support should be the law because it reinforces the statute of limitations policy to give defendants repose. But the policy behind the statute of limitations is not solely that of repose. If that were the case, there would be no discovery rule, no abatement of the running of the statute during minority, or any of the other means that extend statutes of limitations. Rather there would be only one statute of limitations for all causes of action, it would be short, and it would

have no exceptions. That would insure the defendants' repose; but it would not secure justice.

As shown in the opening brief, justice has competing interests of which repose is only one. Contrary to defendants' arguments, the goal of repose is **not** to allow defendants to avoid newly arisen causes of action. It is to protect them from stale claims brought by claimants who have unnecessarily delayed and sat on their rights. That is not the case here. Mrs. Schneider brought her claim after her husband's death and well within the three years allowed for a wrongful death claim. She had no cause of action for that death until it occurred and she could not have brought her claim until it did.

The multiple policies involved in statutes of limitations set out in the opening brief still apply. They seek to reach a balance between discouraging delayed actions and advancing the cause of justice. The support the interests of claimants in gaining restitution and the interest of defendants in not being subject to stale claims. And they preserve judicial economy by **not** requiring claimants to file anticipatory claims and then delay their actions awaiting the ultimate death of the injured party. Defendants would tear down that carefully constructed scheme to serve their own goals.

The legislature created a cause of action for the benefit of the decedent's heirs when the death is caused by the "wrongful act, neglect, or default of another." (R.C.W. 4.20.010) The legislature created a statute of limitations of three years to bring such an action. (R.C.W. 4.16.080(2)). That is the law applicable here. Mrs. Schneider did not sit on her rights, she brought the action within the time allotted, and the court below erred when it held that the statute of limitations had run.

III.
CONCLUSION

The statutes clearly create a new cause of action for the wrongful death of a person. The statutes also create a three year statute of limitations to bring that wrongful death action. The very dated case law relied upon by defendants to support their position, that the action here was barred by the statute of limitations years *before* the death occurred, has been shown to be less than convincing. Even the Washington Supreme Court has stated that the issue is an open question.

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For all the reasons presented in the appellant's opening brief and in this reply, the court should reverse the judgment of the court below and remand the matter for trial on the merits.

Dated: June 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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vs.
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Court of Appeals Division II Cause No. 46566-3-II
Clark County Cause No. 13-2-02291-9

I hereby certify that on the below date, I served a true and correct copy of
- Reply Brief of Appellant

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